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No. 00-596

In the Supreme Court of the United States

LORILLARD TOBACCO COMPANY; BROWN & WILLIAMSON TOBACCO CORPORATION; R.J. REYNOLDS TOBACCO COMPANY; PHILIP MORRIS INCORPORATED; AND UNITED STATES TOBACCO COMPANY,

Petitioners,

v.

THOMAS F. REILLY, ATTORNEY GENERAL OF MASSACHUSETTS,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

REPLY BRIEF FOR THE PETITIONERS

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REPLY BRIEF FOR THE PETITIONERS

I. THE PREEMPTION ISSUE WARRANTS THIS COURT'S REVIEW

The Attorney General concedes, as he must, that there is a clear split among the circuits over whether state regulations that effectively ban all public display of cigarette advertising constitute requirements or prohibitions "with respect to the advertising or promotion" of cigarettes within the meaning of the preemption provision of the Federal Cigarette Labeling and Advertising Act ("FCLAA"). Br. in Opp. 10-11. And he concedes, as he must, that "a number of states and localities" have enacted similar bans. *Id.* at 11. Nonetheless, in an effort to evade this Court's review, the Attorney General tries to minimize the circuit split, to belittle the significance of his own regulations, and to downplay the obvious importance of the question. Br. in Opp. 9-12. These efforts are unavailing.

1. The Attorney General acknowledges that the Ninth Circuit's decision in *Lindsey* is directly contrary to the decisions of the First, Second, and Seventh Circuits on the same question, but he attempts to dismiss *Lindsey* as an "aberration" that gave only cursory attention to 15 U.S.C. § 1334(b). Br. in Opp. 11. That is demonstrably wrong. *Lindsey* was not an unwitting departure from the decisions of the other circuits; on the contrary, the Ninth Circuit explicitly refuted, point-by-point, the erroneous and countertextual construction of the FCLAA adopted by other courts of appeals. *See* Pet. 14-17. Indeed, the end result of the Ninth Circuit's thorough analysis of the statute was an unequivocal repudiation of the holdings of the other circuits:

> Despite the holdings of [the Fourth Circuit in] *Penn Advertising*, [the Seventh Circuit in] *FAIR*, and [the Second

> Circuit in] *Giuliani,* the text of the FCLAA's preemption provision clearly preempts a ban on outdoor advertising because such a ban constitutes a "requirement or prohibition based on smoking and health * * * with respect to the advertising or promotion of any cigarettes."

Lindsey, 195 F.3d at 1073.[1] The Ninth Circuit's rejection of the position of other circuits belies the Attorney General's current effort to downplay the conflict.[2]

Subsequent actions of the First and Ninth Circuits demonstrate that the conflict will not be resolved without this Court's intervention. The Ninth Circuit *sua sponte* issued an order requesting the parties to brief the question whether *Lindsey* should be reheard en banc. Following further briefing, the Ninth Circuit declined to grant en banc review. Indeed, shortly before the Ninth Circuit acted, Judge O'Scannlain (a member of the original panel in *Lindsey*) issued a concurring opinion reaffirming his view that it was the Ninth Circuit that had faithfully followed existing Supreme Court precedent. *See* 203 F.3d at 1150. And after the Ninth Circuit decided not to rehear *Lindsey* en banc, the First Circuit explicitly rejected the Ninth Circuit's position and instead aligned itself with the Second and Seventh Circuits. Pet. App. 13a n.7. The result is a

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[1] This disarray among the circuits is exacerbated by the fact that both the First and Second Circuits, in turn, expressly rejected the alternative theory that had been used by the Fourth Circuit to find no preemption in *Penn Advertising*. *See* Pet. 16 n.8.

[2] The Attorney General also suggests (Br. in Opp. 11) that *Lindsey* is distinguishable because the county in that case did not contest the fact that the plain language of the FCLAA warranted preemption. But in *all* of the pertinent cases the courts of appeals explicitly conceded that the plain language of the FCLAA supported preemption; indeed, the entire thrust of the First, Second, and Seventh Circuit's positions is that the pro-preemption argument rests on an "uncritical literalism." Pet. App. 13a n.7.

mature and well-developed circuit split that cries out for this Court's intervention.[3]

2. The Attorney General's attempts to minimize the importance of this circuit conflict are equally unavailing. Remarkably, the Attorney General first belittles the impact of his own regulations, contending that, in light of the restrictions of the Master Settlement Agreement ("MSA"), his regulations are of limited significance. Br. in Opp. 9-10. To the contrary, the significance—and the severity—of the Attorney General's regulations are *magnified* by the fact that they were imposed on top of the already stringent provisions of the MSA: the regulations effectively eliminate all of the remaining outdoor advertising that the MSA permits. *See* Pet. 3-4.

The Attorney General also claims that his regulations are of importance only to the parties before this Court, but that is likewise wrong. The regulations apply to the literally thousands of *retailers* in Massachusetts who wish to engage in tobacco advertising, as well as the advertising businesses that generate such materials. In addition, reversal of the decision below would directly benefit thousands of retailers and advertisers in the scores of other jurisdictions (including New York, Chicago, and Baltimore) where comparable ordinances have been adopted. Indeed, most of the legal challenges that have been brought against these outdoor advertising bans have been filed by retailers and advertising entities. *See, e.g., Lindsey*, 195 F.3d 1065; *Greater N.Y. Metro. Food Council*, 195 F.3d 100; *FAIR*, 189 F.3d 633. Indeed, the burden of the Attorney General's regulations falls more heavily on retailers, most of whom simply cannot afford to buy newspaper or magazine

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[3] The Court's previous denial of certiorari in the Second and Seventh Circuit cases is of no assistance to the Attorney General. *See* Br. in Opp. 11 n.5. In both of those cases, the petitions for certiorari were *interlocutory*. By contrast, review is sought here from a final judgment that disposes of all issues.

advertising. Finally, the Attorney General's opposition overlooks the fact that the preemption issue is of obvious importance to the scores of state and local governments who have enacted, or are considering adopting, similar regulations.

3. The Attorney General's merits-based arguments similarly confirm the need for review. Br. in Opp. 12-18. Notably, the Attorney General could not bring himself to defend the First Circuit's illogical and countertextual holding that restrictions on the display of tobacco advertising "'[do] not impose obligations "with respect to" advertising as that phrase is used in § 1334(b).'" Pet. App. 10a (quoting *Greater N.Y. Metro. Food Council*, 195 F.3d at 109). And, in describing the applicable principles of statutory construction that must guide the interpretation of § 1334(b), *see* Br. in Opp. 13, the Attorney General nowhere mentions the well-settled rule that the *text* of the statute must be the starting point of the analysis. *See Cipollone,* 505 U.S. at 521-22 (plurality); *see also id.* at 532 (Blackmun, J.); *id.* at 548 (Scalia, J.).

Unable to find a basis for the First Circuit's content/location distinction in the text of § 1334(b),[4] the Attorney General instead attempts to ground the distinction in the "structure and purpose of the FCLAA," and, in particular, in the declaration of purpose contained in § 1331. Br. in Opp. 12-15. Because § 1331 states that the FCLAA is intended to prevent a diversity of regulations "with respect to any relationship between smoking and health," the Attorney General contends that the preemption provision in § 1334(b) must be understood as

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[4] The Attorney General suggests that the Massachusetts regulations are not preempted because they are not "based on smoking and health" within the meaning of § 1334(b). This argument, however, was correctly labeled "sophistry" by the Second Circuit, *Greater N.Y. Metro. Food Council,* 195 F.3d at 108, and was likewise rejected by the court below. Pet. App. 13a n.6. It is undisputed (and indisputable) that the *reason* why these regulations single out *tobacco* for special treatment is because the Attorney General believes that tobacco is an unhealthful product.

applying only to local regulations that "require, or prohibit, smoking-and-health information on cigarette packages or with respect to cigarette advertising." Br. in Opp. 14. This argument rests upon a flatly erroneous construction of the FCLAA that was specifically *rejected* in *Cipollone*.

In *Cipollone*, this Court held that § 1334(b)'s preemption language, as amended in 1969, reached both positive enactments and common law rules. 505 U.S. at 521-24; *id.* at 548-49 (Scalia, J.). In reaching this conclusion, the Court relied upon, *inter alia,* the fact that the language of § 1334(b) had been substantially broadened in 1969; whereas the original version of the statute enacted in 1965 extended only to "statements relating to smoking and heaith" required by state regulations, the 1969 version applied to any "requirement or prohibition" imposed under "State law." 505 U.S. at 518, 522. Despite this significant change in the text of § 1334(b), the petitioner in *Cipollone* (like the Attorney General here) sought to rely upon the fact that the declaration of statutory purpose in § 1331 continued to state (as it did in 1965) that the Act was intended to preempt "diverse, nonuniform, and confusing cigarette labeling and advertising *regulations*"—language that could be read to exclude common law rules. 505 U.S. at 521 n.19. The Court explicitly rejected this attempt to use the leftover hortatory language of § 1331 to limit the plain language of the amended (and expanded) preemption provision § 1334(b): "Although the 1969 Act did not amend [§ 1331], we are not persuaded that the retention of that portion of the 1965 Act is a sufficient basis for rejecting the plain meaning of the broad language that Congress added to [§ 1334(b)]." *Id.* This reasoning squarely forecloses the Attorney General's comparable effort to rely upon the unamended, pre-1969 language of § 1331 as a basis for defending the First Circuit's utter disregard of the text of § 1334(b).

II. THE FIRST AMENDMENT ISSUES WARRANT REVIEW

The Attorney General's efforts to evade this Court's review of the uniquely important commercial speech issues raised by this case are equally unavailing.

1. In arguing that review should be denied because "no division of authority" in the lower courts has emerged (Br. in Opp. 19), the Attorney General conspicuously fails to acknowledge why. The First Circuit held that even the most explicit "rumblings" that a Supreme Court decision "may be in need of minor or major modification" do not give a lower court warrant to ignore that precedent. Pet. App. 16a; *cf. Agostini v. Felton*, 521 U.S. 203, 217 (1997). The First Circuit thus concluded that it was *obliged* "to apply the *Central Hudson* test, as is." Pet. App. 16a. It is therefore puzzling to assert, as the Attorney General does, that the Court should wait for a conflict to develop in the lower courts over the applicability of *Central Hudson* in this context. Because the lower courts are not free to disregard *Central Hudson*, the question is one over which no split of authority can ever emerge. Any modification of *Central Hudson* must come from this Court.

2. The Attorney General cannot deny that there is sharp disagreement within this Court concerning the continued vitality and scope of *Central Hudson*. Indeed, he acknowledges that "the Court or individual Justices" have indicated "that certain commercial speech restrictions call for either an exacting application of the *Central Hudson* test or more heightened review." Br. in Opp. 22. That six Justices have questioned *Central Hudson's* continuing vitality during the last decade, including five sitting Justices, alone makes the issue one of surpassing importance. *See* Pet. 19-21 (collecting cases).

Instead, the Attorney General argues that this case presents "the wrong vehicle for reconsideration of the *Central Hudson*

test." Br. in Opp. 20. But as explained in the petition, this case presents an ideal vehicle for clarifying the outer limits of *Central Hudson* precisely because it satisfies any of the conceivable standards for declining to apply the test set forth in that case. Pet. 23-25. Some Justices have suggested that *Central Hudson* applies only to measures that protect consumer choice rather than suppress truthful information due to its content, *see 44 Liquormart,* 517 U.S. at 501 (opinion of Stevens, J.), while others have suggested that the standard should be abandoned altogether, *see, e.g., id.* at 523 (Thomas, J., concurring in the judgment). Under any of these approaches, the Massachusetts regulations could not withstand scrutiny: they are not disclosure requirements designed to prevent misleading advertising; they suppress truthful and nonmisleading speech; and they cannot be justified by concerns about a fair bargaining process. Moreover, the circumstances of this case clearly indicate a "realistic possibility that official suppression of ideas is afoot." *R.A.V.*, 505 U.S. at 290. This case is the *ideal* vehicle for reviewing the scope of *Central Hudson*.

The Attorney General's contrary arguments are wholly unpersuasive. He contends that the oft-voiced concern that *Central Hudson* inadequately protects against paternalistic suppression of truthful information, *see, e.g., 44 Liquormart*, 517 U.S. at 501 (plurality); *id.* at 522-23 (Thomas, J.), is not implicated here because the regulations are motivated by paternalistic concerns *about children*. Br. in Opp. 22-23. But, regardless of the Attorney General's claimed subjective motivation, the concern about paternalistic suppression of truthful commercial speech remains fully applicable where, as here, the blunderbuss *means* chosen by the State to protect children involve the wholesale suppression of advertising (aimed at *adults*) in virtually all public areas of the State. The Court has consistently held that speech restrictions cannot "reduce the adult population * * * to reading only what is fit for children." *Bolger*, 463 U.S. at 73 (quoting *Butler*, 352 U.S. at

383); *see also Reno*, 521 U.S. at 875; *Denver Area Educ. Tel. Consortium, Inc.*, 518 U.S. at 759.

The Attorney General also argues that the Court's skepticism regarding *Central Hudson* is limited to "blanket prohibition[s]" on speech, not partial prohibitions on speech. Br. in Opp. 23-24. This contention is both wrong and irrelevant. It is wrong because eight Justices in *Greater New Orleans Broad. Ass'n*, 527 U.S. 173, expressly reserved the question whether *Central Hudson* supplied the proper standard in the context of a law that applied to speech "only when conveyed over certain forms of media," *id.* at 191, and because none of the referenced opinions suggests that suppressions of commercial speech are acceptable if they leave open one limited (and, for many, prohibitively expensive) medium of advertising. *See, e.g., Discovery Network, Inc.*, 507 U.S. at 433-34 & n.1 (Blackmun, J., concurring in the judgment). And it is irrelevant because the commercial speech restrictions at issue here are among the most sweeping ever to confront this Court: if these severe restraints do not raise the same core concerns about "blanket" suppression of speech, then it is hard to imagine what regulations would. The Attorney General quibbles over the geographic breadth of this restraint, but he fails to acknowledge that the First Circuit agreed with petitioners that the practical effect of the regulations was to "prohibit virtually all advertising in as much as ninety percent of the land area of Massachusetts' three largest metropolitan areas," Pet. App. 30a, and to leave many tobacco venders "without *any* reasonable alternative means for communicating with the public," *id.* at 33a (emphasis added). A 90% restriction on speech in the three most populated areas of a State warrants the same First Amendment scrutiny that a 100% restriction receives.

3. As the petition demonstrates, review is also warranted here because the Massachusetts regulations constitute a

viewpoint-based limitation on speech that both implicates core First Amendments concerns and offers a categorical ground for narrowing *Central Hudson*. Pet. 24-25. Yet the Attorney General all but ignores the point, relegating his brief response to a footnote. Br. in Opp. 25 n.17.

The Attorney General asserts that there is "no merit" to the claim that strict scrutiny applies to all "viewpoint-based" limitations on speech, but the only support mustered for this startling proposition is a bootstrap quotation of three sentences from the First Circuit's opinion in this very case. Br. in Opp. 25 n.17. In finding no "danger of viewpoint discrimination," the lower court noted that the regulations apply to all tobacco products, "regardless of brand or manufacturer"; that they "permit nonpromotional speech relating to tobacco products"; and that "[t]he companies make no allegation that the Attorney General has disparately, much less discriminatorily, applied these provisions." *Id.* (quoting Pet. App. 15a-16a). But it is hardly reassuring to observe that the regulations have not been applied in a discriminatory manner: who needs to *apply* provisions discriminatorily when the provisions already discriminate *on their face*? And the fact that the regulations prohibit only speech that "promotes" tobacco consumption, *see* 940 C.M.R. 21.03 (Pet. App. 107a), while permitting "nonpromotional" speech that *discourages* tobacco consumption, *see id.* at 14a (allowing "tobacco-related speech that has a purpose or effect other than promotion, such as public health campaigns"), is precisely why the regulations *are* viewpoint-based. The First Amendment does not permit the Attorney General to prohibit only those disfavored messages that are inconsistent with the State's self-proclaimed "war against Big Tobacco." JCA 323 (statement of then-Attorney General Harshbarger in support of regulations). The Court has never applied anything less than strict scrutiny to such outright censorship. This feature of the law by itself supports the grant of review.

4. In arguing that the Court's exacting scrutiny of *content-based* regulations does not apply to commercial speech, Br. in Opp. 21-23, the Attorney General makes no attempt to address the contrary case law cited in the petition. *See Discovery Network, Inc.*, 507 U.S. at 428-30 (invalidating as content-based restraints upon commercial speech); *Linmark Assocs., Inc.*, 431 U.S. at 96; *44 Liquormart*, 517 U.S. at 501 (opinion of Stevens, J.). Nor are the authorities cited by the Attorney General of any assistance to him. Far from making this proposition "clear," *Greater New Orleans* expressly *reserved* this question. *See* 527 U.S. at 184. And *R.A.V.* directly contradicts the Attorney General's argument: the cited passage squarely supports the proposition that content-based distinctions, even those concerning unprotected speech, generally receive strict scrutiny. *See id.* at 388-89. If, as *R.A.V.* demonstrates, strict scrutiny applies to content-based distinctions concerning unprotected categories of speech, like fighting words, then surely it must apply to ostensibly greater-protected categories of speech, like commercial speech.[5]

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[5] Even if *Central Hudson* supplies the proper test here, the Attorney General is mistaken in arguing that petitioners are merely criticizing an "incorrect[] appli[cation of] a properly stated rule of law." Br. in Opp. 26. Rather, the problem is the First Circuit's failure to apply several controlling rules of law. Thus, in attempting to defend the tailoring of the regulations on the ground that they are only "incidental[]" to the protection of children, Br. in Opp. 27, the Attorney General overlooks this Court's statement that this interest "does not justify an unnecessarily broad suppression of speech addressed to adults." *Reno*, 521 U.S. at 874, as well as this Court's holding that a speech restraint cannot be justified as incidental without consideration of "the scope of the speech it proscribes." *Greater New Orleans*, 527 U.S. at 194-95. And the Attorney General errs (Br. in Opp. 27 n.18) in attempting to distinguish *Bolger* and *Carey v. Population Services Int'l*, 431 U.S. 678 (1977), on the ground that they involved a constitutionally-protected right to privacy. In truth, neither case has been so limited. *See, e.g., Virginia v. Am. Booksellers*, 484 U.S. 383, 389 (1988).

For the reasons stated above and in the petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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